



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 590 OF 1996**

ERNEST LANGE

CRHISTEL B. LANGE ..... APLAINTIFFS

VERSUS

BEATRICE KARIUKI

GUNTER KELLER ..... DEFENDANTS

**RULING**

Before me for hearing is a suit filed by the plaintiff claiming compensation from the defendants for damage caused to her house by a fire. The Ruling is a result of an objection raised by Mr. Asige on the production of an investigator's report by the plaintiff. According to him, the plaintiff was not the beneficiary of the said report as it was addressed to the instructing party who were Anjarwalla & Company. He further submitted that no proper basis had been laid to show that the report can be produced by the plaintiff and the provisions of Section 33 and 35 of the Evidence Act have been satisfied.

Mr. Khanna for the plaintiff was however of the view that the plaintiff could safely produce the report as it was prepared for the sole purpose of being used in further proof of her claim.

It is not in dispute the document was prepared on instructions of Njarwalla & Company and it has not been shown that a representative of the Company cannot be availed to produce the same under the Provisions of Sections 33 and 35 of the Evidence Act. The plaintiff in this case, said she never met the maker of the document and since she never gave the instructions towards preparation of the report, I am inclined to agree with Mr. Asige. The Provisions of Section 35(1) are very clear as to when such a document can be admitted. The proviso therein reads as follows:

***“Provided that the Condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead or cannot be found, or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable”***

From the submissions by Mr. Khanna and the plaintiff evidence, the whereabouts of the witness are said to be unknown by the plaintiff. What about Anjarwalla & Company who had given the instructions? Since the plaintiff does not know the witness, it is only Anjarwalla & Company who can lay the basis to invoke the provisions of Section 33 – 35 of the Evidence Act. For the said reasons, the objection is upheld.

**Dated at Mombasa this 29th day of November, 2002.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**

